IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.364 OF 2004

M/s Dewan Chand Ram Saran ... Petitioners

v/s

Rashtriya Ispat Nigam Ltd. ... Respondents

Mr K.K. Ravi i/b Mr N.G. Helekar for Petitioners.

Mr S.A. Bhalval i/b M/s Vyas and Bhalval for Respondents.

CORAM : D.K. DESHMUKH J.

DATE : 4TH JULY 2005.

P.C. :-

1. By this petition, the petitioners challenge the order made by the Sole Arbitrator rejecting the claim made by the petitioners. The claim made by the petitioners was that the service tax under the Finance Act 1994 was payable by the respondents and therefore, under clause 9.3 of the contract, the amount of tax could not have been deducted from the amount payable to the petitioners. The Arbitrator has held that under the Finance Act 1994, the service tax was liability of the respondents and the respondents were assessors, but the learned Arbitrator has held that the petitioners become liable to pay that tax because of clause 9.3. The learned counsel appearing for petitioners submits that the learned Arbitrator has totally misread clause 9.3 of the contract. According to him, under clause 9.3, taxes which are payable by the petitioners can be deducted at source and paid to the authorities by the respondents on behalf of the petitioners. Taxes which the petitioners are not liable to pay cannot be deducted and paid under clause 9.3 of the contract. On the other hand, the only submission made on behalf of the respondents is that the clause 9.3 is very clear and the learned Arbitrator has rightly held that under that clause, amount can be deducted by the respondents from the bills payable to

the petitioners. Now, to understand this, firstly a reference has to be made to the provisions of clause 9.3 of the contract which read as under :-

> "9.3. The Contractor shall bear and pay all taxes, duties and other liabilities in connection with the discharge of his obligations under this order. Any income tax or any other taxes or duties which the Company may be required by law to deduct shall be deducted at source and the same shall be paid to the Tax Authorities for the account of the Contractor and the Company shall provide the Contractor with required Tax Deduction Certificate."

. Perusal of the above clause shows that by this clause, an obligation has been imposed on the contractor to pay all taxes and duties that become payable by him because of his obligation under the contract. In other words, if taxes and duties become payable because of the work carried out by the petitioners under the contract, then it is for the petitioners to make payment of those taxes. The clause further shows that any income tax or other taxes which are payable by the petitioners and which the law provides have to be deducted at source the respondents are obliged to make the deduction from the

amount payable and make over the deducted amounts to the authorities to whom they are due under the relevant tax laws. The learned Arbitrator, after considering the provisions of Finance Act 1994, has recorded a clear finding to the following effect :-

> "There was also a change in section 65 of the Act of 1994 relating to Definitions and for our purposes it may be noted that the term 'assesse' came to be defined as under :-
>
> 'assessee - means a person liable to pay the service tax and includes his agent.'
>
> It is thus the Respondent who is the Assessee and who is liable to pay the Service Tax."

. From the above finding recorded by the learned Arbitrator, it is clear that so far as service tax under the Finance Act 1994 is concerned, the respondents are assesses and it is respondents who are liable to pay the tax. Still the learned Arbitrator holds that because of the recitals in clause 9.3, the burden of payment of tax shifts from the respondents to the petitioners and therefore, it is the petitioners who have to make payment of taxes. The learned Arbitrator has observed thus :-

"Clause 9.3 of the Tender Terms and Conditions of the Contract, to my mind is clear and unambiguous. True it is the Respondent who is the Assessee. It is also true that liability is of the Respondent to pay the tax. But then, under the contract, under clause 9.3 to be more precise, it was agreed that it would be the Claimant who shall bear 'all taxes, duties and other liabilities' which accrue or become payable 'in connection with the discharge of his obligation'. Service tax was one such tax / duty or a liability which was directly connected with 'the discharge of his obligation' as the clearing and forwarding agent. It is this contractual obligation which binds the claimant and though under the law it is the Respondent who is the Assessee, it can and rightly did deduct the service tax from the bills of the Claimant in terms of the said contractual obligation, the validity and legality of which has not been challenged before me."

. To my mind, clause 9.3 has been totally misread by the learned Arbitrator. The purpose of clause 9.3 is twofold viz. (1) to impose an obligation

on the petitioner to pay taxes that may become payable by them under the law in relation to the work under the contract and (2) to create an obligation on the respondents to deduct taxes that are payable by the petitioners and which the law relating to those taxes requires to be deducted at source. The purpose of clause 9.3 is not to shift the burden of taxes from the assessee who is liable under the law to pay the taxes to a person who is not liable to pay the taxes under the law. In my opinion, the award therefore suffers from total non-application of mind and therefore, it is required to be set aside. Petition therefore succeeds and is allowed. The award impugned in the petition is set aside. The respondents are directed to pay the costs of this petition to the petitioners as incurred by the petitioners.

. Parties to act on the copy of this order duly authenticated by the Associate / Personal Secretary of this Court as true copy.

. Certified copy expedited.